

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of Rules and Regulations)	
Implementing the Telephone Consumer)	CG Docket No. 02-278
Protection Act of 1991)	CG Docket No. 05-338
_____)	

**COMMENTS OF MICHAEL NACK ON PETITIONS CONCERNING THE
COMMISSION'S RULE ON OPT-OUT NOTICES ON FAX ADVERTISEMENTS**

I am an attorney and over the years have received an increasing number of unwanted advertising faxes. I have never requested to receive these faxes. I have included my fax number on one or two websites so that clients would know my fax number if they needed to fax documents to my office. However I have determined that my fax number has been listed on various *other* websites without my knowledge. Fax advertisers troll these websites and obtain my fax number and then send advertising faxes to my fax number. I have even instructed my former answering service not to give out my fax number to solicitors.

At times in the past, if a phone number appeared on the fax advertisement I would call the advertiser to tell them that I did not give permission to be sent the advertising fax and that I wanted them to remove my fax number from their fax list. A number of times the person that answered the phone had no knowledge that the company was even sending out fax advertisements and did not know what procedure to follow to stop getting the fax advertisements, which resulted in failure to have my request honored.

I was hopeful that the FCC regulations would require written express permission for advertising faxes to be sent to recipients. It is my understanding that businesses objected to this requirement and this requirement was not adopted. Instead a compromise was reached under the

Junk Fax Prevention Act, which continued to allow permission to be granted orally but added the requirement of an opt out notice with very clear and specific provisions. One caveat that was apparent, however, was that to be effective, an opt out request must comply with the instructions in the opt out notice on the fax. The Commission's JFPA Order made clear that attempting to opt out by giving notice to the sender in a manner different from the specified instructions in the opt out notice would not be considered effective. The FCC rejected commentators' request that any opt out request, even if not following the procedures provided for in the opt out notice, would be an effective opt out. Instead, the Commission adopted the fax advertiser's position that only an opt out request made pursuant to the opt out notice would be an effective opt out request. Because of that requirement I rarely even attempt to make an opt out request if a proper opt out notice does not appear on an advertising fax because the advertiser is free to ignore it. It is hypocritical at best for fax advertisers to now claim that they should have a waiver or exemption by arguing that their contact information was included "somewhere" on the fax and therefore people could contact the sender to stop the faxes.

The Commission spelled out the exact requirements for an opt out notice in 2006 so that all parties including those sending advertising faxes and those receiving advertising faxes had the opportunity to read and comply with the regulations as enacted. Each of these provisions is important. Requiring a fax number is needed for those that want to opt out by sending the fax back to the sender. Requiring a voice number is also necessary, since some people will not want to take the time to compose a fax to send back. The cost-free mechanism requirement is absolutely necessary since to have to pay to stop unwanted faxes merely adds insult to injury. The requirement to state in the notice itself that it is unlawful for the sender to fail to comply

with an opt out request within 30 days, provides a critical notice to both the consumer that his request is lawfully enforceable, and to the advertiser that not only does the law require their compliance, but that the consumer is aware of this law and the enforceability of the request. Finally, the requirement that it be clear and conspicuous, and set apart from the advertising by being at the top or bottom of the page. Many times before the new rules were enacted, I have had to hunt through tiny fonts on a fax to try to locate the instructions (if any) to make an opt out request.

Since express permission to receive advertising faxes is not required to be in writing, it is extremely important for recipients of fax advertisements to know exactly how to opt out of receiving future fax advertisements. The Commission has not defined what "prior express invitation or permission" means, so that ambiguity must be balanced by clear and unambiguous opt out procedures in a notice, and a clear and unambiguous right to withdraw express consent and opt out of future faxes. For example I know of a person who granted a company permission to send them one fax. Unfortunately the Commission declined to impose a time limit on express consent or an EBR exemption for faxes. Under the current regulations once permission is granted it is not just granted for one fax but rather it lasts forever unless consent is revoked, so for the recipient to stop getting faxes he would need to know the acceptable procedure to do so. The Commission has said that everyone, including consumers who previously consented to fax ads, has the right to stop those faxes. But without an opt-out notice on a fax advertisement, how can someone who previously consented to the faxes exercise their right to stop the faxes in an enforceable manner? That notice is part and parcel of the Commission's determination that consumers have the unilateral right to withdraw consent.

There is no reason why companies can not put a proper opt out notice on all advertising faxes in order to effectuate the balance the Commission has chosen by not defining "prior express invitation or permission" and not adopting a time limit on the duration of such consent. When the Commission passed the regulation concerning the opt out notice in 2006 it made it very clear that the opt out notice had to be on all advertising faxes. The public has benefited and will continue to benefit by having an opt out notice on all advertising faxes. The Commission should not retroactively change a regulation that has been in force since 2006. I have seen many fax advertisements that had a proper opt out notice on the bottom of the fax so these advertisers checked the regulations and complied with the opt out regulation.

Fax advertising is a highly regulated business and anyone engaging in fax advertising should have checked the regulations which were available for all before they sent out thousands and thousands of fax advertisements.